

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

R. G. LEARY CONSTRUCTION COMPANY)
INC.,)

Appellant,)

v.)

STATE OF WASHINGTON, DEPARTMENT)
OF ECOLOGY,)

Respondent.)

PCHB No. 90-1

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a civil penalty of \$750 for alleged violation of the water pollution control statute came on for hearing on May 1, 1990, in Seattle, Washington, before the Pollution Control Hearings Board; Wick Dufford, Presiding, and Judith A. Bendor, Chair.

Robert Leary, President of Leary Construction, represented appellant. Ann C. Essko, Assistant Attorney General, represented respondent. The proceedings were reported by Kim Otis.

Witnesses were sworn and testified. Exhibits were admitted and examined. From the testimony heard and exhibits examined, the Board makes the following

FINDINGS OF FACT

I

On September 27, 1989, the Department of Ecology issued Notice of Penalty Incurred and Due No. DE 89-N231. The notice was directed to Leary Construction Company of Seattle and assessed a fine of \$750 for

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1 an alleged violation of the state water pollution control act,
2 described as follows:

3 On August 8, 1989, the Department of Ecology was
4 notified by the City of Kirkland of a paint spill and
5 upon investigation by an Ecology Inspector, it was
6 found that Leary Construction Company of Seattle had
7 disposed of paint waste and solvents into the storm
8 sewer sytem tributary to Juanita Creek, during
9 construction activities at 12320 - 120th Place NE in
10 Kirkland. The discharge of pollutants to waters of
11 the state is a violation of RCW 90.48.080.

12 After pursuing the discretionary penalty mitigation procedure
13 with Ecology, Leary Construction appealed the penalty to this Board.
14 The appeal was filed on January 2, 1990, and assigned docket no. PCHB
15 90-1.

16 The parties agree that the date August 8, 1989, as recited in the
17 notice of penalty is in error. The correct date is August 4, 1989.
18 In this particular, the notice is deemed amended.

19 II

20 The site of the incident is Larry's Supermarket No. 6 in
21 Kirkland, which in August of 1989 had just been completed.

22 In connection with the supermarket, a storm sewer had been
23 built. The storm sewer is a system of grates and drains which connect
24 to a subsurface network of small settling basins and pipes which lead
25 ultimately to a large retention basin on the edge of the property.
26 The retention basin has a capacity of around 150,000 gallons and is
27 designed to accommodate a 100 year flood. The outlet from the basin

1 is small and located several feet above its floor, so that the
2 dispersal of stormwater is slowed.

3 The system at Larry's Supermarket connects to a pre-existing
4 storm sewer across the street. Ultimately the storm water is
5 discharged to Juanita Creek which flows into Lake Washington. Under
6 the state's water quality standards, Juanita Creek is classified as
7 AA, the highest water quality classification.

8 III

9 On August 3 and 4, 1989, the new storm water system was being
10 cleaned out and flushed. Prior to that time it had not rained for
11 over a month.

12 Around noon on August 4, a City of Kirkland inspector detected a
13 paint odor coming from the large retention basin. Leary's job
14 superintendent was contacted at 12:10 p.m. He also could smell paint
15 fumes.

16 The superintendent immediately (12:18 p.m.) telephoned the
17 Department of Ecology and requested an "urgent response" field
18 inspection. He then called public works authorities of Kirkland and,
19 thirdly, the company president, Robert Leary.

20 IV

21 An official from Kirkland public works arrived at 12:40 p.m. and
22 requested that plugs be installed to prevent the escape of any paint
23 from the supermarket's storm system. The cleaning of the system was
24

1 halted and plugs were obtained and installed. There is no evidence
2 that any paint left the immediate site, prior to its discovery in the
3 retention basin.

4 V

5 Efforts to recover the paint were begun immediately after it was
6 discovered. By the time Ecology's inspector arrived (1:10 p.m.), a
7 gob of paint had been brought up. It was a vivid blue color which
8 Leary's superintendent recognized at once as the color used only in
9 the kitchen/cafe of the supermarket. This area had been painted by a
10 subcontractor in mid-June. The distinctive zolotone, an oil-base
11 paint, had not been used since, and the supply of it had been removed
12 from the site long before August 4.

13 VI

14 Ecology's inspector recommended that Leary retain a waste spill
15 clean-up contractor and at 1:25 p.m. the firm of Crosby and Overton
16 was called. At 4:40 p.m. a representative of Crosby and Overton
17 arrived on site and arrangements were made to flush the pipes and
18 clean the system under their direction beginning at 8:00 a.m. the
19 following day, August 5, 1989.

20 VII

21 On August 5, 1990, a Saturday, the system was flushed from top to
22 bottom and the flushings were pumped into a tanker truck. The parties
23 agree that two to three gallons of the blue paint were recovered.
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1 14,000 gallons of water were pumped into the Crosby and Overton
2 truck. The pumping was completed around 3:30 p.m., followed by an
3 inspection.

4 VIII

5 The clean-up was thorough and successful. There is no evidence
6 that paint was left in the system and escaped into the environment
7 after the job was done and the plugs were pulled. Ecology concedes
8 that Leary's response to the problem was well-handled. Both the job
9 superintendent and the company president took an active role in
10 pursuing the clean-up to a rapid and effective conclusion.

11 IX

12 Ecology's inspector found no indications of where the paint might
13 have entered the system. There is no direct evidence of who dumped
14 the paint. Leary believes paint was dumped into the upper storm sewer
15 sometime in June or early July, where it remained until being washed
16 down into the retention basin when the system was flushed in early
17 August.

18 We find that how or when the paint got into the storm sewer or
19 who put it there was not proven. (The painting subcontractor,
20 apparently, cannot now be found.)

21 X

22 Nevertheless, Leary Construction was involved in the causal chain
23 which led to the presence of the paint in the sewer. But for the
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1 actions of Leary Construction in mobilizing all of the various tasks
2 involved in the project, the paint would not have been brought on-site
3 and could not have ended up where it did.

4 XI

5 Ecology has a record of one prior incident involving Leary
6 Construction. On a 1986 job, where Leary was the general contractor,
7 a painting subcontractor poured waste paint and solvent into a storm
8 sewer.^{1/} In that case, Leary was able to compel the subcontractor
9 to admit responsibility and pay the penalty.

10 The 1986 incident prompted Leary, thereafter, to supply a 55
11 gallon drum to each painting subcontractor, with instructions to use
12 it for wastes. The Company also developed elaborate contract
13 provisions designed to impress upon subcontractors the necessity for
14 pollution prevention.

15 XII

16 Any Conclusion of Law which is deemed a Finding of Fact is hereby
17 adopted as such.

18 From these Findings of Fact, the Board reaches the following
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21 ^{1/} Factually the earlier incident differs from the present one in
22 that then the dumped paint actually did escape the storm sewer and
23 enter a creek. But, it is only the absence of rain in July of 1989
24 which accounts for this difference.

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over the parties and the subject
4 matter. Chapters 43.21B and 90.48 RCW.

5 II

6 The Notice of Penalty here asserts violation of RCW 90.48.080.
7 That section states:

8 It shall be unlawful for any person to
9 throw, drain, run, or otherwise discharge into any of
10 the waters of this state, or to cause, permit or
11 suffer to be thrown, run, drained, allowed to seep or
12 otherwise discharged into such waters any organic or
13 inorganic matter that shall cause or tend to cause
14 pollution of such waters according to the
15 determination of the department as provided for in
16 this chapter. (Emphasis added.)

17 There is no contention here that the paint dumped into the storm
18 sewer was not a pollutant, nor that the discharge did not involve
19 waters of the state. In any event, we conclude that both of these
20 criteria were met. See RCW 90.48.020 (definition of pollution);
21 National Can Corp. v. DOE, PCHB No. 615 (1975) (waters in storm sewer
22 as waters of the state). Thus, a prohibited discharge did occur in
23 violation of RCW 90.48.080.

24 III

25 The contested issue here is whether Leary Construction is legally
26 responsible for the prohibited discharge. We conclude that they are.

27 RCW 90.48.080 in making it unlawful for any person to "cause,

1 permit or suffer" discharges which "tend to cause pollution,"
2 establishes a strict liability standard. CH2O Inc. v. DOE, PCHB Nos.
3 84-182 and 85-66 (1985). Neither intent nor negligence are relevant.
4 The question is only whether the acts of the general contractor were
5 closely enough connected to the events as to be properly held a
6 cause-in-fact of the violation.

7 We conclude that a general contractor is not so remote in the
8 causal chain as to be insulated from legal responsibility. If a
9 prohibited discharge occurs as a result of project activities set in
10 motion by the general contractor, we conclude that the general
11 contractor is a person who has "caused, permitted or suffered" the
12 discharge within the meaning of RCW 90.48.080.

13 In so holding, we do not rest our conclusion on imputed
14 liability. Rather we decide that the general contractor is liable
15 under the statute directly on the basis of its own role and regardless
16 of whether the immediate agent of the prohibited result is an
17 employee, a subcontractor or a stranger.

18 IV

19 RCW 90.48.144 authorizes the assessment of civil penalties up to
20 \$10,000 per day per violation against "every person who . . . violates
21 the provisions of RCW 90.48.080." In setting the penalty Ecology must
22 take into consideration "the previous history of the violator and the
23 severity of the violation's impact on public health and/or the
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1 environment in addition to other relevant factors."

2 The Board has long held that "other relevant factors" include the
3 actions of the violator to solve the problem, particularly those done
4 in the time frame between the incident and the date the penalty is
5 assessed. See, e.g., Jensen's Dairy v. DOE, PCHB No. 84-240 (1984);
6 Weyerhaeuser v. DOE, PCHB 87-224 and 87-33 (1988).

7 V

8 Under all the circumstances here, we do not believe it is
9 appropriate to subject Leary Construction to immediate monetary
10 penalties.

11 The remedial actions taken by the company were in all respects
12 exemplary. They acted swiftly and decisively and pursued the problem
13 until it was corrected.

14 The violation in question was not severe. No paint actually
15 escaped into the environment. And given the quantity involved, even
16 the threat of pollution was modest.

17 Ecology emphasizes that the purpose of RCW 90.48.080 is to
18 prevent pollution before it happens, rather than to focus on remedial
19 actions. While this point is well-taken, we note that under the
20 particular facts here the escape of pollutants was prevented.

21 Further, there is nothing in this record to suggest what more
22 Leary Construction could have done on the front end to prevent what
23 occurred.

1 We conclude, therefore, that the Order set forth below is
2 appropriate.

3 VI

4 Any Finding of Fact which is deemed a Conclusion of Law is hereby
5 adopted as such.

6 From these Conclusions of Law, the Board enters the following
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ORDER

The violation asserted in Notice of Penalty Incurred and Due No. DE 89-N231 is affirmed. The \$750 Civil Penalty is suspended on condition that Leary Construction not violate the water pollution control laws of this state for three years from the date of this Order. If, after that time no violations have occurred, the penalty shall be cancelled.

DONE this 25th day of June, 1990.

POLLUTION CONTROL HEARINGS BOARD

Wick Dufford

WICK DUFFORD, Presiding

Judith A. Bendor

JUDITH A. BENDOR, Chair

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